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BETWEEN:

ANGELSTONE LIMITED PLAINTIFF;

AND

ARTISTIC STONE LIMITED DEFENDANT.

Industrial Design—Industrial Design and Union Label Act, R.S.C. 1952, c. 160—Action for infringement and passing off—“Angelstone Limited” —“Shadow Stone”—“Artistic Stone Limited”—Sand-O-Stone—Design one of a building block lacking ornamental feature—Design not registrable—No evidence of passing off—Plaintiff’s design expunged from register.

The action is one for infringement of plaintiff’s duly registered Industrial Design of a building block. Defendant counterclaimed for expungement of the like. The Court found that the description of the design is that of an article of manufacture namely the building block in respect of which the certificate of registration of the design was issued, and that it also lacks novelty and was a reproduction with minor alterations of a design for building blocks that were in use before plaintiff’s engineer and sales manager conceived the idea, and consequently not original. The Court also found that the plaintiff had failed to establish that the defendant, for purposes of sales, had manufactured building blocks to which it had applied the plaintiff’s design or a fraudulent imitation thereof and had offered for sale or sold such building blocks.

Held: That the design in question was one for the article of manufacture itself and not for the ornamenting of such article; it is that of a building block itself and has no ornamental feature which could have resulted from the application or attachment or engraving of an ornamental design, and was not registrable and should be expunged from the register.

ACTION for infringement of plaintiff’s Industrial Design.

The action was tried before the Honourable Mr. Justice Fournier at Hamilton.

G. D. Finlayson for plaintiff.

David Watson for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

FOURNIER J. now (February 19, 1960) delivered the following judgment.

This is an action by the plaintiff for infringement of its duly registered Industrial Design of a building block and passing off and for an injunction restraining the defendant, its agents and workmen from applying, for purposes of sale, its industrial design or fraudulent imitations thereof, and from manufacturing, advertising or selling building blocks to which said designs or imitations thereof have been applied. The defendant counterclaims for expungement of the above Industrial Design.

The plaintiff is a company incorporated and carrying on business in Canada, having its head office at the City of Hamilton, Province of Ontario. Its business is the manufacture, sale and distribution of pre-cast building stone used in the construction of residential, commercial and institutional establishments. Its building blocks are intended to imitate natural cut stone.

As its general sales manager, Mr. Alan A. Camp was in charge of the development of its products and of its production and sales. He is a graduate engineer and a member of the Professional Engineers' Association.

During 1953, in the course of his functions and duties and to help expand the plaintiff's business, he conceived the idea of developing a pre-cast building block which would have a rustic appearance. His object was to manufacture an artificial stone which would imitate and duplicate natural cut stone as it came out of the quarry. He proceeded by casting a mixture of cement and other ingredients into a rectangular mould. When the substance began to solidify, with the aid of some instrument a groove was made upon its surface on the length of the rectangle so as to weaken one side of the block on a predetermined line. When the substance had hardened it was taken out of the

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mould. The result of the operation was a rectangular block of artificial stone twenty-four inches long, nine inches wide and two inches thick. At the beginning, the groove was a multiple wave (three waves). A little later, it was two waves. Mr. Camp stated that some of these multiwave building blocks were sold in October 1953. Finally the groove was made in the shape of an elongated letter S. The block was split with a chisel and hammer by striking two or three times on different parts of the opposite side of the block to that of the groove. The split generally followed the groove or the weakened line of the block. The plaintiff began production of these last building blocks late in the fall of 1953 and put them up for sale early in the spring of 1954.

It was found that the blocks which were split along the line of an elongated S had more similarity with cut natural stone than the others. When these blocks were used in buildings, they gave a certain effect of shadow and light; hence they were named "Shadow Stone". Designs of the "Shadow Stone" were prepared and an application was made for the registration of the said designs under the *Industrial Design and Union Label Act*, R.S.C. 1952, chap. 150. A certificate of registration of the Industrial Design for a building block No. 133 was issued on January 26, 1955 to the plaintiff as proprietor and owner.

The defendant is a company incorporated and carrying on business in Canada. Its principal place of business is Homeside P.O., Hamilton, Province of Ontario. In 1953 or 1954, its president and general manager, Walter Kazemekas, bought building blocks from the plaintiff for the building of a house. He thought these artificial stones were quite expensive, so he decided to experiment to see if he could develop a building block which would resemble sand stone. He examined very closely the plaintiff's product, with the intention of manufacturing a building block which would imitate natural hand cut sandstone. He tried different mixtures of material and experimented during seven months on the preparation and manufacture of his proposed product. He was not successful for quite a while, but at last he did succeed in processing a building block. There is no doubt that to arrive at his end he used a process

having the characteristics of the process used by the plaintiff. He then proceeded to manufacture and sell a pre-cast block, which he named "Sand-O-Stone", having a resemblance to the plaintiff's product and to natural cut sandstone.

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In September or October 1956, Mr. Camp, the plaintiff's general sales manager, pursuant to an agreement with the defendant's general manager, visited the defendant's plant to investigate the processes followed by the defendant in the production of its ware. He did not see the actual manufacture of the defendant's building block, but the operations were explained to him by Mr. Kazemekas and a few pieces of the stone produced were exhibited to him. He states that the blocks were cast stone slabs like those of the plaintiff's, that the faces of the stones were similar to those of the "Shadow Stone" and that the name of the defendant's product was "Sand-O-Stone". He later saw samples of these stones on houses. Mr. Kazemekas says he told Mr. Camp, during the latter's visit, that at the outset he had used an instrument to make the groove on the surface of the block but that he had now developed a mould with a steel ribbon at the bottom which makes the groove.

Having succeeded in processing a building block which at least in his mind imitated natural cut sandstone, he proceeded to manufacture and sell his product on the general market.

On April 18, 1957 the plaintiff filed his statement of claim for infringement of its registered Industrial Design of a building block and for an order of restraint and damages.

The defendant denies infringement and passing off; in a counterclaim, he attacks the validity of the plaintiff's registered industrial design and prays that it be expunged from the register.

I shall deal first with the question of the validity of the plaintiff's registered industrial design, for should it be found that the registration is invalid there could be no infringement of the industrial design.

The defendant admits that the plaintiff is registered as the proprietor of Industrial Design No. 133, Folio 19756, for a building block registered January 26, 1955, but denies

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that it is the proprietor of the said industrial design. This action being brought under the *Industrial Design and Union Label Act*, R.S.C. 1952, vol. III, c. 150, s. 7 thereof deals with the effect of registration; s-s. (3) says:

7. (3) The said certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act.

So the onus of establishing that the person named as the proprietor is not in fact or in law the proprietor of the design rests on the defendant. The defendant did not adduce evidence to demolish the plaintiff's *prima facie* case that the certificate issued was evidence of the facts therein asserted.

The Act states:

25. Every certificate under this Act that any industrial design has been duly registered in accordance with the provisions of this Act, which purports to be signed by the Minister or the Commissioner of Patents shall, without proof of the signature, be received in all courts in Canada as *prima facie* evidence of the facts therein alleged.

Counsel for the defence did question Mr. Camp on this point. The witness stated that after examining natural cut stone as it came out of the quarry he conceived the idea that it would be possible to develop a process by which a cast stone building block could be manufactured so as to have the appearance of natural cut stone. Through trial and error, he reached a point where he thought he had devised the necessary process. He tried it on cast stone slabs and was satisfied with the results. He then started to make sketches of the product; he showed them to the president of the company and discussed their merits. With the help of specialized designers, the sketches became the design which was registered. Though there is no definition of the word "author" in the Act, I believe the witness to be the author of the design. This brings us to the section of the Act which deals with the proprietorship of a design:

12. (1) The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

This section is complemented by the provisions of s. 8, which reads as follows:

8. Where the author of any design has, for a good and valuable consideration, executed the same for some other person, such other person is alone entitled to register.

Mr. Camp, the author of the design, was the general manager of the plaintiff corporation, in charge of production and sales. Amongst his many duties was the development of existing and new products. In his evidence he enumerated a list of articles which he had developed alone or in conjunction with the president of the company. He was a full time employee and when he was working on the idea of the building block in question and experimenting the process he had devised it was on his employer's time and at his expense. He was working within the scope of the duties for which he was employed. He received his salary and in return, as part of his duties, he attended to the development of the plaintiff's products. I believe that he executed the design for the plaintiff for a good and valuable consideration, as Cameron J. states in the *Renwal Manufacturing Company, Inc. and Reliable Toy Co. Ltd. et al.*¹ (p. 194):

. . . The good and valuable consideration is found in the salary paid by the plaintiff to Rosenbloom, part of the duties which were paid for by his salary being the designing and styling of new articles.

In the present instance, I have come to the conclusion that the development of the plaintiff's products by its general manager was an obligation arising from the contract of service and was one of the duties of this employee. Therefore his salary covered not only his production and sales duties, but also his endeavours to develop existing and new products.

The defendant also attacks the validity of the registration on the grounds that the design is neither novel nor original and that natural stone having the appearance of the building block shown in the design has been in use for many years. Counsel for the defence submits that the product which it manufactures under the name of Sand-O-Stone is not an infringement because it is not similar to the industrial design; furthermore, that the industrial design is invalid because the *Industrial Design and Union Label*

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Act does not permit the registration of an article of manufacture itself but merely "for the ornamentation of any article of manufacture".

It is generally accepted that neither the mode of construction of a manufactured article nor the material from which the product is made are protected by the registration of an industrial design. A perusal of the application first filed for registration of the design will support the above statement.

The application, as filed, was entitled "An Industrial Design of a Cast Stone Building Block" and "the industrial design consists of a 'Cast Stone Building Block' having the following features of ornament."

The Registrar, in a letter dated January 12, 1955, made objection to this in the following words:

The mode of manufacturing (cast) and the material used (stone) are irrelevant in design cases and should be omitted from the title. This title, it is believed, would be improved if restricted to "Building Block".

The letter continues:

As a design cannot be an article of manufacture the words "Cast Stone Building Block" should not be used in the description of the ornamentation.

On January 18, 1955, the plaintiff's agent filed a letter stating:

A revised application and duplicate originals is enclosed, with alterations suggested by the Examiner, except for a minor change in the description of the front face, the change having been made to improve the style of the description.

The application thus became a request for the registration of an Industrial Design for a Building Block the design of which has the appearance of a short plank. The drawings annexed to the application are described as follows:

Fig. 1 is a perspective view looking downwardly at the block towards the front face;

Fig. 2 is a sectional view along the line 2-2 of figure one showing the one bevel;

Fig. 3 is a sectional view along the line 3-3 of Fig. 1 near the middle of the block; and

Fig. 4 is a sectional view along the line 4-4, showing the opposite bevel.

The application, the description of the design of the drawings and the registration are for an article, namely, "a building block".

The first paragraph of the application reads:

We Angelstone Limited . . . hereby request you to register in our name an Industrial Design for a Building Block of which we are the proprietors.

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Though in the application the design is described as having the appearance of a short plank, after the description of the front face it is added:

. . . said face having the texture of a broken surface and the other faces of the block having the texture of cast surfaces.

Even the amended application and the descriptions of the design leave no doubt that the design was that of a building block manufactured by the plaintiff and that what was desired to be protected by the registration was the building block itself. I believe the evidence will bear me out when I say that the author of the design, after having devised what he thought was a novel and original process for splitting cast stone building blocks which gave them a certain appearance of natural cut stone, proceeded to make sketches and drawings of the shape and configuration of the product which was the result of their operations. The plaintiff then requested the registration of the finalized design. Many experiments were made before the final result of obtaining a building block which could meet the description used in the application.

At the trial, Exhibit No. 9 was filed by the plaintiff. It is entitled "Principle for producing Shadow Stone" (showing plans and cross-sections) and indicates the result of the different operations of manufacture of the above building block called Shadow Stone. The document is interesting in that it shows how the building block is produced. It has three sketches: the first demonstrates the basic known principle—which was the subject of cited patents—to obtain a rectangular stone with no pitch; the second is a variation of the basic known principle and is used to obtain an S shaped stone with no pitch; and finally what the designer calls the Unique Shadow Stone, with reversing pitch along face. A close study of the exhibit has convinced me that the Shadow principle is a combination of the two other principles and that principles two and three are variations of the first principle. All this to say that in my view the author charged with product development of the

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plaintiff corporation, after deciding to produce an imitation of natural cut stone, had to find a way to obtain the desired result. It is not the design which was important—he had models before his eyes—; it was the mode of construction that was essential and the material to be used. It is from this that he adopted variations of a basic known principle to split cast stone blocks to have the appearance of natural cut stone. After being successful in his endeavours, he proceeds to have the results finally designed and registered. I do believe that the design is that of a building block which the plaintiff commenced manufacturing in the fall of 1953 and selling in the early part of 1954.

It is Lord Moulton, in the case of *Phillips v. Harbo Rubber Co.*¹, who quotes Mr. Justice Parker in *Pugh v. Riley* (p. 239, *in fine*):

. . . A registered design is not in any way a minor type of patent. It is something that is protected in respect of its appearance or form alone. It is for this reason that all attempts to make registered designs cover modes of manufacture have rightly failed, and that the Courts have so invariably insisted on the principle that designs must be judged by the eye alone.

I am not unmindful that these remarks were based on the British Statute, but they have been adapted to Canadian cases.

There being no definition of the word in the Canadian Act under which this action was brought, one has to refer to s. 16 of our Statute to determine what constitutes an infringement of a registered Industrial Design. The section reads:

16. (1) Every person who, in violation of the provisions of this Part, during the existence of the exclusive right acquired for any industrial design by the registration of the same under this Part, whether of the entire or partial use of such design, without the licence in writing of the registered proprietor, or, if assigned, of his assignee,

(a) for the purposes of sale, applies or attaches such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached; or

(b) publishes, sells or exposes for sale or for use any article of manufacture or other article to which an industrial design may be applied or attached and to which such design or fraudulent imitation thereof has been applied or attached;

shall forfeit a sum not exceeding one hundred and twenty dollars and not less than twenty dollars to the proprietor of the design so applied or attached.

According to the provisions of this section, it would seem that the design should be something that can be applied or attached to any article of manufacture or any other article for its ornamentation.

In the *Renwal Manufacturing Company, Inc. and Reliable Toy Co. Ltd. et al. (supra)*, Mr. Justice Cameron, at p. 196, states:

There is considerable uncertainty as to whether a design for shape or configuration which can only be applied to a thing by making it in that shape comes within the Canadian Act. According to the statute the design must, it would seem, be something capable of application to any article of manufacture or other article "for the ornamentation thereof."

And at p. 197:

I have been unable to find in the Act anything which would indicate that the shape or configuration of an article of manufacture may itself be the subject of a registered design.

The certificate of registration is for a design in connection with a building block. The description of the drawings indicates the shape and configuration of the building block, viz.:

one longitudinal edge of which is the front face, said face having adjacent one end a bevel formed by a downward and outward slope of the face, and having adjacent the other end an opposite bevel formed by a downward and inward slope of the face, the one bevel blending into the other whereby said face resembles a twisted surface, said face having the texture of a broken surface and the other faces of the block having the textures of cast surfaces.

I have come to the conclusion that this description is that of an article of manufacture, to wit the building block in respect of which the certificate of registration of the design was issued. It has been held on many occasions that an industrial design may be protected only when it is applicable to the ornamentation of any article and not to the article of manufacture itself.

I was referred to a number of English cases on this point. It seems generally agreed that the consideration of these decisions should be approached with caution, because the *English Design Act* is different from our Act and has been changed on a number of occasions. I believe the decisions of our courts and their interpretation of the sections of the Canadian Act dealing with violations of its provisions should serve as the basis of the decision sought in this case.

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The case most often quoted on the point at issue is that of *Clatworthy & Son Ltd. and Dale Display Fixtures Ltd.*¹ In his remarks at p. 162, Maclean J. says:

The scope of this part of the Trade-Mark and Designs Act is difficult of definite ascertainment or construction. It is a piece of legislation that seems flimsy and incomplete, ill adapted for its intended purposes, and is seriously in need of amendment. I think it is clear that a design within the Act may be some ornament, printed, woven or produced on such articles as textile fabrics, paper hangings, floor cloths, lace, etc., or some ornament produced in such things as metal articles, glass or tiles. The Act seems confined to designs applicable to manufactured articles, and the application of such design to such articles; it does not apply to the things to which a design is applied. The Act is not clear when the design is merely for the shape of a thing, and it may be doubtful if a design for shape or configuration, which can only be applied to a thing by making it in that shape, comes within the Act. In the corresponding English Act, 1907, it does, but the statute there states that "Design" means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, etc., and the same was true of the English Act of 1883.

On appeal, the Supreme Court of Canada² affirmed the judgment. It decided the matter on the question of anticipation, the design not being novel. It did not rule on the question that a design could be registrable for the external shape or configuration of an article.

Three years later, in the case of *Canadian Wm. A. Rogers, Ltd. v. International Silver Co. of Canada, Ltd.*³ Maclean J. dealt again with the above question (p. 65):

I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd. v. Miner Rubber Co. Ltd.* ([1926] Ex. C.R. 26) I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design", under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture" were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned.

¹[1928] Ex. C.R. 159.

²[1929] S.C.R. 429.

³[1932] Ex. C.R. 63.

The *Industrial Design and Union Label Act*, R.S.C. 1952, c. 150, under which the present case was brought, in its s. 16 (Violation of this Part) is an exact reproduction of s. 39 of the *Trade Mark and Design Act*. So the remarks *supra* can apply to the provisions of the present Act as they did to the former statute.

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Now in the *Renwal Manufacturing Company, Inc.* and *Reliable Toy Co. Ltd. et al.* case aforesaid, Cameron J. states that he is in accord with the views of Maclean J. in the cases from which I have quoted excerpts, where it is said that an industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture. It is the design—not the article of manufacture—which is protected.

I believe this rule is applicable in this instance and amongst the reasons which give rise to that opinion is the evidence of Mr. Camp. It seems to me that he was more interested in finding what process of manufacture Artistic Stone Ltd., the defendant, followed in the production of Sand-O-Stone than in the design itself. According to his evidence, he visited the defendant's plant and found that it manufactured a cast stone building block by a process based on the same principle as the one developed by the plaintiff. The operation was explained to him by the president of the defendant corporation. Later he saw samples of the stone on houses. He then expressed the opinion that Sand-O-Stone was similar to the plaintiff's Shadow Stone. It was after that the plaintiff brought this action.

The principle underlying the process employed by both parties to fracture cast stone building blocks, so that they would have the appearance of natural cut stone, had not been patented by the plaintiff at the time of the filing of this action. But a patent had been registered under the Canadian Act on July 6, 1926 under No. 262,286 and granted to one Herman Besser for "Fractured blocks and method of making the same". The application, after describing the material of a cast stone building block, explains and describes the method used to fracture the block. The method used by the plaintiff and the defendant for splitting building blocks is only a variation of the basic principle

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applied on the Besser method, where the groove on one side of the block is on a straight line, whilst here the groove is on a curved line, as described by the witness. It is the face of the broken surface which the witness tried to design.

Cast stone building blocks have been in use for a long time by the construction people. The process to fracture these blocks in two, so that the broken faces of these two blocks would lose their appearance of cast stone and take on the appearance of natural cut rock or stone according to the application for Patent No. 262,286, has been known since 1926 or before.

At the hearing, counsel for the plaintiff agreed that a fair consideration of the matter of the design would be that the author, desiring to develop an imitation of cut stone having a rustic appearance, experimented with a process or method of splitting or fracturing cast stone slabs which gave a certain result. He repeated the experiment and the result, although not exactly similar, seemed to him to be about the same. It is the result of these experiments that he tried to represent in the design. Assuming these facts to be the case, I think the design is what the author thought was a copy or representation of a building block produced by a certain mode of construction.

What he discovered when visiting the defendant's plant was that it applied a similar mode of construction for the manufacture of its building blocks. Later he saw some of the defendant's building blocks which it had sold. I believe that it was for the protection of its building block and its method of manufacture that application for the registration of the design was made.

Furthermore, I have examined the models filed as exhibits and the design. There are dissimilarities between the models and between the models and the design. The same may be said about the models of both parties. This is quite understandable, because the shape, form and configuration of the front face of the building blocks were not brought about by the application or attachment of the design as an ornamentation thereof; they were the result of a process of manufacture of cast stone building blocks, to wit, the fracture of the blocks, which result cannot be constant because the operation depends upon many factors and imponderables which are difficult to control.

The evidence has convinced me that in the case of the design here the objective of the designer was to reproduce a building block having the appearance and shape of other building blocks, with a variation obtained by using the groove method for fracturing the block, which was a known process of manufacture. It seems to me that the Act was enacted to protect persons who conceive something new and original and then express it on a design. The idea of fracturing a cast stone slab to obtain an imitation of natural cut rock or stone was nothing new or original: it had existed and been used for years. The only minor alteration effected by the author was to change a straight groove on the face of the slab to one having the form of an elongated S. I believe this to be a matter of detail which, in my opinion, does not justify the registration, seeing that it lacks novelty and was a reproduction with minor alterations of a design for building blocks that were in use before Mr. Camp conceived the idea.

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Other facts have impressed me, which considered with those dealt hereinabove, may assist in determining the issue. The mode of construction of fractured blocks by way of one or more grooves had been known before the plaintiff made its original application for the registration of its design on August 13, 1954. Had the original description not been revised, I have serious doubts that the application would have resulted in the granting of its registration. It was amended on January 18, 1955 so as to eliminate any reference to the mode of construction or material of the building block. Still the certificate of registration is made with regard to a building block.

This being so, it was admitted by the witness, Mr. Camp, that a multiwave stone had been made which was the same as Shadow Stone, except that instead of having a single wave it had a double wave, and that the multiwave stone had been sold during October 1953. The purchasers followed the plaintiff's recommendation of breaking up a certain percentage of that stone in sizes which would be half or one third of its length. The witness agreed that the description of the industrial design was in accordance with the configuration of the multiwave stone but for one exception: there was a difference in proportion when the multiwave stone was broken. This would mean that at least

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in October 1953 there was a building block on the market having the configuration of the industrial design; the design was therefore neither novel nor original.

The plaintiff also claims that the defendant attempted to pass off and did pass off its building blocks for those of the plaintiff.

The evidence showed that the defendant, after having built a house with cast stone building blocks which had the appearance of natural cut stone, conceived the idea of developing a process to manufacture a cast stone sand block imitating natural cut sandstone. I believe the blocks were the products of the plaintiff, but I have doubts that the building blocks were Shadow Stone. At all events, he experimented for months with the mixture of material to be used, then with different processes of manufacture. At last he succeeded. I am satisfied that his process of manufacture is based on the same basic principle as the one having been followed by the plaintiff; besides, I am of opinion that, in both cases, the method was a standard one that was common to the trade. What is certain is that it was not the application or attachment or engraving of a design to an article.

Was there unfair competition? Was the manufactured building block advertised and sold in a manner which would amount to unfair practice?

The products of both parties had this similarity that they imitated natural cut stone. This does not mean that the result of the processes of manufacture of the blocks was a reproduction of the design. Every exhibited block that I have examined offers certain differences with the design, though they all have the appearance of natural cut stone. They have no other shape or form than that which resulted from the splitting of the cast stone slabs. The Canadian Statute does not provide that the shape and configuration of the article manufactured is a proper subject of registration.

The principle to follow in passing off cases is enunciated in *Macleans, Ltd. v. J. W. Lightbown, and Sons, Ltd.*¹ at page 239:

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. . . No trader can complain of honest competition, but no trader is entitled to steal the property of his rival by endeavouring to attract to his goods members of the public by inducing them to believe that the goods that are being offered for sale are the goods of a rival firm. . . .

There is no evidence before the Court that the defendant had made any express or implied false representations that could have given the public the idea the building block offered or sold was a product of the plaintiff corporation. The defendant's corporate name "Artistic Stone Limited" and the name of its product "Sand-O-Stone" could hardly be confused with "Angelstone Limited" and "Shadow Stone". There is nothing on record which would lead me to think that the defendant's name and that of its product were devised to confuse and deceive the public. I may add that no evidence was adduced to the effect that the goods of both parties had been confused in anybody's mind.

I fail to see how the defendant's article could be mistaken for that of the plaintiff. They may resemble each other, but they also resemble others that are on sale. They are imitations of natural cut stone the features of which are not always the same and which cannot be said to always have the same shape.

As to the question of the plaintiff's building block not having been properly marked after the registration, the evidence is far from being convincing. The plaintiff did mark his goods and, as time went on, developed a mark which, in my opinion, did meet the requirements of the statute.

For the reasons set forth in these notes I have come to the conclusion that I should follow the decisions handed down by this Court in the cases of *Kauffman Rubber Co. Ltd.*; *Clatworthy & Son Ltd.* and *Dale Display Fixtures Ltd.*; *Canadian Wm. A. Rogers, Ltd. v. International Silver Co. of Canada, Ltd.*; and *Renwal Manufacturing Co., Inc.*, and *Reliable Toy Co. Ltd. et al.* (hereinabove referred to).

¹ (1937) 54 R.P.C. 230.

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In these cases the Court found that the applications and registrations were for the article of manufacture itself and not for the ornamenting of such article.

In the present instance, I am of the opinion that the design is that of a building block itself and has no ornamental feature which could have resulted from the application or attachment or engraving of an ornamental design. The shape and configuration and outline of the building block was the result of a mode of construction.

This is in accordance with the provisions of ss. 11 and 16 of the *Industrial Design and Union Label Act*, 1952, c. 150.

The design being contemplated is one which when applied or attached to any article of manufacture adds to the article some ornamentation.

I find that the design registered by the plaintiff lacks novelty, because imitations of natural cut stone have been in existence for many years and the process for obtaining such imitations was known long before the registration of the plaintiff's design. Therefore the design was not registrable.

I also find that the plaintiff failed to establish that the defendant, for purposes of sales, had manufactured building blocks to which it had applied the plaintiff's design or a fraudulent imitation thereof and had offered for sale or sold such building blocks.

I am of the view that there is no legal grounds for an action against the defendant based on unfair competition. I find that the plaintiff's industrial design was not registrable and should be expunged from the register.

Therefore, the plaintiff's action will be dismissed and the defendant's counterclaim will be sustained; the whole with costs to be taxed against the plaintiff.

Judgment accordingly.